Supreme Court, U.S.
FILED

931435 FEB 22 1994

No. _____
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

THE BOARD OF GOVERNORS OF REGISTERED DENTISTS OF THE STATE OF OKLAHOMA,

Petitioner,

v.

LOIS JACOBS, D.D.S.,

Respondent.

Petition For A Writ Of Certiorari To The SUPREME COURT OF THE STATE OF OKLAHOMA

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February, 1994

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The Petitioner the Oklahoma Board of Governors of Registered Dentists petitions for a writ of certiorari to review the November 23, 1993 decision of the Supreme Court of the State of Oklahoma.

Question Presented

Whether the First Amendment Precludes a State Regulatory Board From Prohibiting the Use of the Term "Specialist" In Advertising by Individuals Who Do Not Hold Specialty Licenses And Who Have Not Been Certified as Specialists by any Other Agency or Organization.

Parties to the Proceedings

The Petitioner, the Board of Governors of Registered Dentists of the State of Oklahoma is the regulatory agency responsible for regulating the practice of dentistry in Oklahoma. The Respondent, Lois Jacobs, D.D.S., is a licensed general dentist who was reprimanded by the Petitioner for representing herself as a specialist when she did not hold a specialty license.

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Opinions Below

The opinion of the Supreme Court of the State of Oklahoma was not published and is reprinted as Exhibit A to the Appendix to this Certiorari Petition. The August 10, 1993 opinion of the Court of Appeals was not published and is reprinted as Exhibit B in the Appendix to this Certiorari Petition. The September 13, 1993 Oklahoma Court of Appeals opinion denying rehearing in this case is attached as Exhibit C. The opinion of the District Court for Tulsa County, Oklahoma was not published and is reprinted as Exhibit D to the Appendix to this Certiorari Petition. The opinion of the Petitioner the Oklahoma Board of Governors of Registered Dentists of the State of Oklahoma was not published and is reprinted as Exhibit E to the Appendix to this Certiorari Petition.

Jurisdiction

The decision of the Supreme Court of the State of Oklahoma was filed on November 23, 1993. The Petitioner the Oklahoma Board of Governors had jurisdiction over this matter pursuant to Okla. Stat. tit 59 § 328.32. The District Court for Tulsa County, Oklahoma had jurisdiction over this matter pursuant to Okla. Stat. tit. 75 § 318. The Supreme Court of the State of Oklahoma and the Oklahoma Court of Appeals had jurisdiction over this matter pursuant to Okla. Stat. tit. 12 § 952 and Okla. Stat tit. 20 § 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

Statutory and Regulatory Provisions Involved

This case involves the Oklahoma Dental Act, Okla. Stat. tit. 59 §§ 328.1, et seq., and particularly § 328.22 and 328.32. These sections of the Oklahoma Dental Act are reprinted as Exhibit F to the Appendix to this Petition.

Statement of the Case

This case arises out of an advertisement placed in the general dentistry section of the Southwestern Bell Yellow Pages for Greater Tulsa by the Respondent, Lois Jacobs, a licensed dentist. Among other things, the advertisement identified Dr. Jacobs as a "dentist anesthesiologist" and an "Advanced University & Hospital Trained Specialist in Anesthesiology."

In May, 1991, the Petitioner the Oklahoma Board of Governors of Registered Dentists (the Dental Board) received a citizen's complaint alleging that the subject advertising was false and misleading. Subsequently, the Dental Board conducted an investigation and issued a formal Complaint against Dr. Jacobs alleging several violations of the

Oklahoma Dental Act, Okla. Stat. tit. 59, §§ 328.1, et seq. In particular, the Board alleged that in representing herself as a specialist in dental anesthesiology when she did not have a license in such a specialty, Dr. Jacobs violated the provisions of the Dental Act that prohibit such representations by individuals not holding specialty licenses. See Okla. Stat. tit. 59 § 328.22.

On November 9, 1991, the Dental Board conducted a hearing on the formal complaint against Dr. Jacobs. At that hearing, the Dental Board heard testimony that neither the Board's rules nor the American Dental Association recognizes specialty within dentistry in the field of anesthesiology. In addition, the Board heard testimony that although Dr. Jacobs had received training in anesthesiology, no university, society, organization, or regulatory board had certified her as a

specialist in anesthesiology. In particular, Dr. Jacobs responded as follows to the Dental Board's special prosecutor:

Q. Do any societies or organizations, that you are a member of, recognize you as a specialist in anesthesiology?

A. No.

Q. And you're not certified by any society or professional organization as a specialist in dentist anesthesiology?

A. No.

At the conclusion of the hearing, the Dental Board found Dr. Jacobs guilty of violating both Okla. Stat. tit. 59, § 328.32(g) (dishonorable or unprofessional conduct) and § 328.32(i) (holding herself out as especially qualified in a branch of dentistry in which she does not have a specialty license).

The Dental Board found that Dr. Jacobs violated these provisions by holding herself out as a dentist

anesthesiologist and as a specialist and by stating that her services were available at "your own dentist office". In light of these violations, the Board formally reprimanded Dr. Jacobs. The Dental Board also placed Dr. Jacobs' dental license on probation for a period of two years and directed her to comply with all provisions of the state Dental Act and the Dental Board's rules during the probationary period.

Following the Dental Board's decision, Dr. Jacobs appealed to Tulsa County District Court. The Tulsa County District Court reversed the Dental Board's decision, holding that the statements in the subject advertisement were protected by the First Amendment to the United States Constitution. Subsequently, the Oklahoma Court of Appeals affirmed the Tulsa County District Court's decision.

The Court of Appeals subsequently denied the Dental Board's Petition for Rehearing.

After reviewing this decision, the Dental Board filed a petition for a writ of certiorari in the Supreme Court of the State of Oklahoma. On November 23, 1993, in a 5-4 decision, the Oklahoma Supreme Court denied the Dental Board's petition.

Reasons for Granting the Writ

In recent years, this Court has decided a number of cases regarding the extent to which states may regulate professional advertising without violating practitioners' First Amendment rights. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); In Re R.M.J., 455 U.S. 191 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Nevertheless, this Court has not finally determined to what extent state regulatory authorities may properly prohibit the use of the term "specialist", particularly in instances such as the one at bar in which no certifying body has recognized a practitioner as a "specialist". In addition, state and federal courts have reached conflicting conclusions regarding this issue. Accordingly, this Court should grant this

Petition for a Writ of Certiorari to resolve this important question.

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER STATE LICENSING BOARDS MAY PROHIBIT THE USE OF THE TERM "SPECIALIST" BY PRACTITIONERS WHO HAVE NOT BEEN AS CERTIFIED AS SPECIALISTS BY ANY OTHER AGENCY, SOCIETY, OR PROFESSIONAL ORGANIZATION.

In Peel v. Attorney Registration and Disciplinary Commission of Illinois, 496 U.S. 91 (1990), this Court concluded that state commission had violated an attorney's First Amendment rights by imposing disciplinary action against him for stating on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy. However, in reaching the conclusion, this Court noted that the attorney's certification statement was literally true. This Court wrote, "The facts stated on Petitioner's letterhead are true and verifiable. It is undisputed that NBTA

has certified Petitioner as a civil trial specialist and that three states have licensed him to practice law." 496 U.S. at 100.

In contrast to Peel, in the case at bar, Dr. Jacobs has admitted that no societies or organizations of which she is a member recognize her as a specialist in dental anesthesiology and that she has not been certified by any society or professional organization as such a specialist. To be sure, the record indicates that Dr. Jacobs has received education and training in the field of anesthesiology and that she does belong to several professional anesthesiology organizations. Nevertheless, the term "specialist," constitutes Dr. Jacobs own subjective assessment of her credentials.

This case thus affords this Court an opportunity to clarify the extent to which state licensing boards may prohibit the

use of the term "specialist" by individuals such as Dr. Jacobs who confer that designation upon themselves. Given the emphasis placed by the Peel opinion on the literal truth of the attorney's statement of specialty certification in his letterhead, it would seem that state licensing boards might indeed be able to limit or prohibit the use of the term "specialist" when no certifying body has conveyed that designation upon a practitioner. However, in the instant case, the Oklahoma Court of Appeals and the Oklahoma Supreme Court read this Court's decisions to prohibit such a restriction. Since a number of state licensing boards issue specialty licenses and regulate the practice of specialties within various professions, resolution of this question will provide needed guidance to state licensing boards in regulating the use of the term "specialist". See

Peel, 496 U.S. at 103 n.11 (discussing certification of specialties by state bar associations and state medical boards).

This Court should thus grant certiorari to resolve this important question.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG LOWER STATE AND FEDERAL COURTS REGARDING THE DEGREE TO WHICH STATE LICENSING BOARDS MAY PROPERLY RESTRICT THE USE OF THE TERM "SPECIALIST" AND ANALOGOUS TERMS AND PHRASES RELATING TO PROFESSIONAL PRACTICE.

Applying the decisions of this Court, lower state and federal courts have reached contrasting conclusions as to the extent to which state licensing boards may properly restrict the use of the term "specialist" and analogous terms and phrases. For example, in Parmley v. Missouri Dental Board, 719 S.W.2d 745 (Mo. 1986) the Missouri Supreme Court considered a constitutional challenge similar to the one advanced by Dr. Jacobs

in this case. In Parmley, a dentist holding a general license argued that the Missouri statute that precluded him from advertising a specialty in pedodontics violated his First Amendment right to engage in commercial speech. In rejecting Dr. Parmley's argument, the Missouri court first noted that "the state has a substantial and long-recognized interest in maintaining quality medical care for residents; this of necessity calls for some mechanism by which to police the ranks of health professionals to sustain a chosen level of competence among them." 719 S.W.2d at 751.

The court further noted that Missouri's limiting the right to hold oneself out as a specialist to those possessing a specialty license was a reasonable means of protecting the dental health of the public. Most importantly, the court held that because of the

potential deception involved in using terms such as "specialist," Missouri's blanket prohibition of the use of the term by unlicensed individuals was not overly restrictive. The court stated:

> Similarly "specialist" and like terms bear no reliable and intrinsic meaning; the content of a specialty is tied to the educational or other requirements which qualify a professional to hold himself out as one who specializes. Bereft of standard, the term still may project a high degree of profession on its face, but the underlying qualification is subject to the whims of the user. Thus, to permit this sort of information to "flow freely" would in essence keep consumers ignorant of crucial information which they must be able to rely on in choosing a dentist for their children. . . . The general public requires some uniform standard of minimal competence and the ability to rely on <u>each and every</u> representation that a particular dentist in fact qualifies as a specialist in pedodontics.

719 S.W. 2d at 753 (citations omitted). The <u>Parmley</u> court also noted that a state Dental Board was entitled to enforce this

general prohibition without reviewing the credentials of each unlicensed person who sought to advertise to determine if he or she actually qualified as a specialist. 719 S.W.2d at 753.

Similarly, in a recent decision, the Oklahoma Court of Appeals has rejected a First Amendment challenge to a state board's restrictions on the way in which a practitioner may describe his qualifications. In Steelman v. Oklahoma State Board of Medical Licensure and Supervision, 824 P.2d 1142 (Okla. App. 1992) a licensed physician requested permission to hold himself out as "board certified by the American Board of Bariatric Medicine." A duly promulgated rule of the Oklahoma Board of Medical Licensure provides that physicians may claim to be "board certified" only if they have completed the requirements for certification by a member board of the

organization of American Board of Medical Specialties or by an organization found by the licensure board to be equivalent thereto. The Board concluded that Dr. Steelman did not possess credentials equivalent to Board certification by a member board of the American Board of Medical Specialties and therefore was not entitled to hold himself out as Board certified by the American Board of Bariatric Medicine.

Dr. Steelman then appealed the Medical Licensure Board's decision, arguing that he had a First Amendment right to hold himself out as Board certified under the First Amendment. Applying this Court's commercial speech decisions, the Oklahoma Court of Appeals rejected Dr. Steelman's challenge. It concluded:

> While Steelman is entitled to commercial free speech, the right is not absolute. The Board, as an arm of the state seeking to protect the public's health and safety, may make reasonable restrictions on Steelman's right to advertise himself as "Board certified". He may not so advertise himself, when he has not met the reasonable requirements set by the Board to do so.

824 P.2d at 1144-45.

The reasoning of Parmley and Steelman has been followed by numerous other courts. See e.g., Kale v. Department of Health and Environmental Control, 391 S.E.2d 573 (S.C. 1990), upholding regulation preventing chiropractors from describing facility as a "hospital" because the term "chiropractic hospital" is deceptive); Accountant's Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) (upholding statute prohibiting non-licensed individuals from using the term "public accountant" because "some members of the public would believe the title has

the state's imprimatur"); Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466 (9th Cir. 1983) (upholding state regulation barring doctor of osteopathy from describing himself as M.D. despite the fact that osteopath claimed that his personal philosophy of medicine was best reflected by the title "M.D."). Barnett v. Maryland Board of Dental Examiners, 444 A.2d 1013 (Md. 1982) (holding that state dental board may prohibit the use of the term "polydontics" because it connotes a dental specialty).

In contrast to the Missouri Supreme Court's decision in Parmley, in this case the Oklahoma Court of Appeals and the Oklahoma Supreme Court have determined that a state licensing board may not properly prohibit the use of the term "specialist" by an individual licensed as a general dentist but not as a specialist. The Sixth Circuit has reached a conclusion

that is similar to the Oklahoma courts and that contrasts to the Parmley and Barrett decisions. See Parker v. Commonwealth of Kentucky Board of Dentistry, 818 F.2d 504 (6th Cir. 1987) (concluding, inter alia, that a dental board may not prohibit a general dentist's use of the term "orthodontics" in an advertisement).

This case thus presents this Court with an opportunity to resolve a conflict between the courts regarding the extent to which a state regulatory board may restrict the use of "specialist" and analogous terms.

Conclusion

For the reasons set forth above, this Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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